

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL SAVETSKY, individually and)	Case No. 14-03514 SC
on behalf of all others similarly)	
situated,)	ORDER DENYING MOTION TO
)	<u>COMPEL ARBITRATION</u>
Plaintiff,)	
)	
v.)	
)	
PRE-PAID LEGAL SERVICES, INC.)	
d/b/a LegalShield,)	
)	
Defendant.)	
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)	
)	

I. INTRODUCTION

Now before the Court is Defendant LegalShield's¹ motion to compel arbitration. ECF No. 18 ("Mot."). Plaintiff Michael Savetsky opposes. ECF No. 24 ("Opp'n"). The motion is fully briefed, ECF No. 26 ("Reply"), and appropriate for resolution without oral argument under Civil Local Rule 7-1(b). For the reasons set forth below, the motion is DENIED.

¹ Defendant is actually named Pre-Paid Legal Services, Inc., but does business as LegalShield. For simplicity the Court will refer to Defendant as LegalShield.

1 II. BACKGROUND

2 This is a putative class action alleging that LegalShield
3 improperly charged recurring payments for pre-paid legal services
4 without sufficient consent or disclosure.

5 Pre-paid legal services providers generally eschew the
6 traditional 'fee-for-service' model of legal representation,
7 instead selling fixed-rate memberships that entitle customers to a
8 menu of legal services. See generally Judith L. Maute, Pre-Paid
9 and Group Legal Services: Thirty Years After the Storm, 70 Fordham
10 L. Rev. 915, 916-18 (2001). LegalShield contracts with law firms
11 in the states where it operates and, in exchange for a monthly fee
12 (sometimes as little as \$20 per month) gives its members access to
13 that law firm for various types of legal services. LegalShield
14 provides non-legal services as well, including identity theft
15 protection, which can be purchased along with or separately from a
16 pre-paid legal services plan.

17 When a prospective customer logs on to LegalShield's website,
18 he is presented with the option to "Buy Now" or "Learn More." If
19 he chooses to "Buy Now," the customer is prompted to select his
20 state and given an overview of the pre-paid legal service plans
21 available in that state. Alongside those options is a link to
22 "More Plan Details." A customer need not review those additional
23 details to purchase the plan, however, if he does, he is informed
24 that the details are "a general overview," and "[f]or more specific
25 information, please view our member contract." ECF No. 18-2
26 ("Pinson Decl.") at Ex. A. The words "member contract" are a link
27 that takes the prospective customer to a sample version of
28

1 LegalShield's member contract. The member contract in effect when
2 Savetsky purchased his membership contained the following clause:

3 **Settlement of Disputes:** All disputes or claims
4 relating to the Company, this Contract, any
5 Company products or services or any claims or
6 causes of action between you and the Company,
7 and any of the Company's officers, directors,
8 employees or affiliates, whether in tort or
9 contract, shall be settled totally and finally
10 by arbitration according to the Commercial
Arbitration Rules of the American Arbitration
Association If you file a claim or
counterclaim against the Company . . . in any
such arbitration, you may do so only on an
individual basis and not with any other member
or as part of a class action

11 Pinson Decl. Ex. C ("Membership Contract"), at 7. After selecting
12 the services the customer would like to purchase and entering his
13 personal information, the customer reaches the "Payment
14 Information" screen. That screen states that "I wish to pay by
15 Credit Card until I revoke this authorization in writing," and
16 informs the consumer that "[y]our account will be drafted each
17 month on or about the effective date of your membership." Pinson
18 Decl. Ex. A at 9. To advance to the next screen, the consumer must
19 check a box next to the statement:

20 Authorization for Electronic Premium: I, . . .
21 authorize LegalShield, to make direct payment
22 by charge/draft of my checking/savings/credit
23 card account from the Financial Institution
listed above. (This authority will remain in
effect until you notify us in writing to
terminate the authorization.)

24 Id.

25 Savetsky purchased his membership online using the process
26 outlined here. After enrolling, his membership contract containing
27 the arbitration clause cited above was mailed to the address he
28 provided.

1 Subsequently, Savetsky filed this putative class action in
2 Alameda County Superior Court, seeking to represent a class of
3 those who purchased a LegalShield membership online in California
4 since December 1, 2010, and alleging that the drafting of recurring
5 payments for LegalShield membership from customer accounts violates
6 various California consumer laws. LegalShield removed the case to
7 this Court and now seeks to compel arbitration. Savetsky opposes.

8 9 **III. LEGAL STANDARD**

10 Section 4 of the Federal Arbitration Act ("FAA") permits "a
11 party aggrieved by the alleged failure, neglect, or refusal of
12 another to arbitrate under a written agreement for arbitration [to]
13 petition any United States district court . . . for any order
14 directing that . . . arbitration proceed in the manner provided for
15 in [the arbitration] agreement." 9 U.S.C. § 4. The FAA embodies a
16 policy that generally favors arbitration agreements. Moses H. Cone
17 Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

18 To determine whether a valid arbitration agreement exists, we
19 "apply ordinary state-law principles that govern the formation of
20 contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S.
21 938, 944 (1995). Here the parties agree that California law
22 governs.

23 24 **IV. DISCUSSION**

25 This case requires the Court to resolve whether the parties
26 entered into a valid and enforceable agreement to arbitrate
27 Plaintiff's claims. If so, the Court must then decide whether to
28 dismiss the case entirely or stay the action pending the resolution

1 of arbitration. See Sparling v. Hoffman Constr. Co., 864 F.2d 635,
2 638 (9th Cir. 1988).

3 Because arbitration is a creature of contract, the crux of
4 this motion is whether Savetsky assented to arbitrate his disputes
5 with LegalShield. See United Steelworkers of Am. v. Warrior & Gulf
6 Nav. Co., 363 U.S. 574, 582 (1960) ("[A] party cannot be required
7 to submit to arbitration any dispute which he has not agreed so to
8 submit."). If assent is lacking, then the Court must deny the
9 motion. Nevertheless, even if assent is present, Savetsky argues
10 that the parties' agreement is unenforceable because it is illusory
11 and unconscionable. Because the Court finds assent is absent, the
12 arbitration clause cannot be enforced.

13 **A. Assent**

14 "Promises become binding when there is a meeting of the minds
15 and consideration is exchanged. So it was at King's Bench in
16 common law England; so it was under the common law in the American
17 colonies; . . . and so it is today." Specht v. Netscape Commc'ns
18 Corp., 150 F. Supp. 2d 585, 587 (S.D.N.Y. 2001), aff'd, 306 F.3d 17
19 (2d Cir. 2002).

20 Under California law, mutual assent is required to form a
21 contract and can be demonstrated either by words or by actions.
22 See Binder v. Aetna Life Ins. Co., 75 Cal. App. 4th 832, 850
23 (1999). "[A]n offeree, knowing that an offer has been made to him
24 but not knowing all of its terms, may be held to have accepted, by
25 his conduct, whatever terms the offer contains." Windsor Mills,
26 Inc. v. Collins & Aikman Corp., 25 Cal. App. 3d 987, 991 (Cal. Ct.
27 App. 1972). In such a case, the Court must determine "whether the
28 outward manifestations of consent would lead a reasonable person to

1 believe the offeree has assented to the agreement." Knutson v.
2 Sirius XM Radio, Inc., 771 F.3d 559, 565 (9th Cir. 2014) (citing
3 Meyer v. Benko, 55 Cal. App. 3d 937, 942-43 (Cal. Ct. App. 1976)).
4 Arbitration agreements are no exception, and the "principle of
5 knowing consent applies with particular force to provisions for
6 arbitration." Windsor Mills, 25 Cal. App. 3d at 992.

7 While the internet has changed the factual circumstances in
8 which courts must apply these principles, the requirement of
9 "'mutual manifestation of assent, whether by written or spoken word
10 or by conduct, [remains] the touchstone of contract.'" Nguyen v.
11 Barnes & Noble, Inc., 763 F.3d 1171, 1175 (9th Cir. 2014) (quoting
12 Specht, 306 F.3d at 29). Three paradigmatic contract formation
13 situations arising on the internet, "clickwrap," "shrinkwrap," and
14 "browsewrap" agreements, illustrate the application of the assent
15 requirement in similar circumstances to those at issue here. See
16 generally Mark A. Lemley, Terms of Use, 91 Minn. L. Rev. 459, 459-
17 60 (2006) (discussing each of these types).

18 The first, a clickwrap agreement, is familiar to most internet
19 users and requires a user or prospective customer to check a box or
20 click an "I agree" button after being presented with terms and
21 conditions (or more realistically after declining the opportunity
22 to review the often voluminous terms and conditions). See Nguyen,
23 763 F.3d at 1175-76. "Essentially, under a clickwrap arrangement,
24 potential licensees are presented with the proposed license terms
25 and forced to expressly and unambiguously manifest either assent or
26 rejection prior to being given access to the product."
27 Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 429 (2d Cir.
28 2004). Because "[b]lanket assent to a form contract is still

1 assent, albeit a more attenuated form than the assent that drives
2 contract theory," courts generally find that clickwrap agreements
3 are enforceable. Lemley, Terms, supra at 466.

4 Assent in the shrinkwrap context is more attenuated still,
5 however courts generally enforce shrinkwrap agreements as well.
6 Shrinkwrap agreements are common in the computer software or
7 hardware context, and are related to unilateral contracts in that
8 they involve the "'money now, terms later' approach to
9 sales" O'Quin v. Verizon Wireless, 256 F. Supp. 2d 512,
10 516 (M.D. La. 2003). A classic shrinkwrap agreement generally
11 involves "(1) notice of a license agreement on product packaging
12 (i.e., the shrinkwrap), (2) presentation of the full license on
13 documents inside the package, and (3) prohibited access to the
14 product without an express indication of acceptance."
15 Register.com, 356 F.3d at 428; see also ProCD, Inc. v. Zeidenberg,
16 86 F.3d 1447, 1449 (7th Cir. 1996) (describing and enforcing a
17 shrinkwrap license for software). Assent to a shrinkwrap agreement
18 is not demonstrated at the time of purchase (like in the clickwrap
19 context), and instead the customer's actions after receiving the
20 product or service demonstrates his assent.

21 Finally, there are "browsewrap" agreements. "'[I]n a pure-
22 form browsewrap agreement, the website will contain a notice that
23 -- by using the services of, obtaining information from, or
24 initiating applications within the website -- the user is agreeing
25 to and is bound by the site's terms of service.'" Nguyen, 763 F.3d
26 at 1176 (quoting Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 837
27 (S.D.N.Y. 2012)) (quotation and internal quotation marks omitted).
28 As several courts have noted, assented is even more attenuated in

1 browsewrap agreements than in the clickwrap or shrinkwrap contexts
2 because "user[s] can continue to use the website or its services
3 without visiting the page hosting the browsewrap agreement or even
4 knowing that such a webpage exists." Be In, Inc. v. Google Inc.,
5 No. 12-cv-03373-LHK, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9,
6 2013). As a result, courts generally require users have actual or
7 constructive knowledge of a website's terms and conditions before
8 enforcing browsewrap agreements. Nguyen, 763 F.3d at 1176; Van
9 Tassell v. United Mktg. Grp., LLC, 795 F. Supp. 2d 770, 790 (N.D.
10 Ill. 2011); Sw. Airlines Co. v. BoardFirst, LLC, No. 06-CV-0891-B,
11 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007); see also Lemley,
12 Terms, supra at 477.

13 The circumstances at issue in this case do not fit neatly into
14 any of these categories. Instead LegalShield's presentation of its
15 terms shares some characteristics with all three. Nonetheless, by
16 comparing clickwrap, shrinkwrap, and browsewrap agreements to the
17 process by which Savetsky enrolled in LegalShield, it is clear that
18 he did not consent to arbitrate disputes at any point.

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When a consumer chooses the "Buy Now" option on LegalShield's website and enters his state of residence, in this case, California, a user next sees this:

California Plans Not in California? Choose another state or province

CA Legal Plan	Identity Theft Plan	Identity Theft Premium
\$19⁹⁵	\$14⁹⁵	\$29⁹⁵
Plan Details <ul style="list-style-type: none"> • Legal Advice/Consultation • Letters/Phone Calls • Legal Document Review • Uncontested Divorce and Adoption Representation • Trial Defense • 24/7 Emergency Assistance ~ More Plan Details 	Plan Details <ul style="list-style-type: none"> • Covers Member, Spouse, and Up To 8 Dependents • Single-Bureau Credit Monitoring • Personal Credit Score • Comprehensive Restoration • Identity Consultation • SafeGuard For Minors ~ More Plan Details 	Plan Details <ul style="list-style-type: none"> • Covers Member, Spouse, and Up To 8 Dependents • Triple-Bureau Credit Monitoring • Personal Credit Score • Comprehensive Restoration • Internet Monitoring • Lost Wallet Assistance ~ More Plan Details
Product Discount Get Identity Theft at a discounted price when you buy the legal plan <input type="checkbox"/> Identity Theft Plan (details) only \$9.95/month <input type="checkbox"/> Identity Theft Premium Plan (details) only \$19.95/month	LegalShield Legal Plan <input type="checkbox"/> LegalShield Plan additional \$19.95/month Reduces Identity Theft Price to \$9.95/month	LegalShield Legal Plan <input type="checkbox"/> LegalShield Plan additional \$19.95/month Reduces Identity Theft Price to \$19.95/month
Plan Add-Ons <input type="checkbox"/> Trial Defense Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement + GoSmallBiz (details) only \$14.95/month	Plan Add-Ons <input type="checkbox"/> Trial Defense Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement + GoSmallBiz (details) only \$24.90/month	Plan Add-Ons <input type="checkbox"/> Trial Defense Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement (details) only \$9.95/month <input type="checkbox"/> Home Business Supplement + GoSmallBiz (details) only \$24.90/month
BUY NOW	BUY NOW	BUY NOW
\$19.95/month (+\$10.00 non-refundable enrollment fee charged with the first month's membership)	\$14.95/month (+\$10.00 non-refundable enrollment fee charged with the first month's membership)	\$29.95/month (+\$10.00 non-refundable enrollment fee charged with the first month's membership)
Have an Independent Sales Associate contact me	Have an Independent Sales Associate contact me	Have an Independent Sales Associate contact me

If the user clicks the "More Plan Details" button (circled in red in the above graphic), then (and only then) will the user see this screen:

LegalShield Legal Plan:

Expected and unexpected legal issues arise everyday. But with a LegalShield Legal Plan, a small monthly fee gets you access to advice and counsel on an unlimited amount of personal legal issues from attorneys with an average of 19 years experience.

The following provides a general overview of what our Legal Plan offers you and your family.

For more specific information, please view our member contract.

Who the Legal Plan covers:

- The member
- The member's spouse
- Never-married dependent children of the member or member's spouse, under 26 years of age who are permanent residents of the member's household or full-time students
- Dependent children under age 18 for whom the member or member's spouse is legal guardian
- Any dependent child, regardless of age, who is physically disabled or mentally incapacitated and unable to make legally binding decisions, unable to be employed, 51% or more financially dependent upon the member and member's spouse and lives at home with the member or member's spouse.

Advice, Consultation, Representation

Advice

- Toll-free phone consultations with your Provider Law Firm for any personal legal matter even on pre-existing conditions.

Letters and Phone Calls on Your Behalf

- A phone call or letter on an attorney's letterhead can help you get the

The "More Plan Details" page continues at length, providing details about the various services included in a LegalShield membership, pointing out at the end that a prospective member should "consult [the member] contract 'for the complete terms and conditions' of

1 his LegalShield membership." Mot. at 9 (quoting Pinson Decl. Ex.
2 A) (internal alterations omitted). The words "member contract,"
3 circled in red in the above graphic, are a link to a sample version
4 of LegalShield's member contract, including the arbitration
5 provision.

6 LegalShield argues that Savetsky agreed to arbitrate his
7 claims simply by purchasing his LegalShield membership using this
8 process. In short, LegalShield believes that the website design
9 discussed above adequately communicated the terms of the agreement
10 or, at a minimum, put Savetsky on inquiry notice of the terms, and
11 as a result, the contract is binding whether he read it or not.
12 True, "[a] party cannot avoid the terms of a contract on the ground
13 that he or she failed to read it before signing," Marin Storage &
14 Trucking, Inc. v. Benco Contracting & Eng'g, Inc., 89 Cal. App. 4th
15 1042, 1049 (Cal. Ct. App. 2001), but an exception exists "when the
16 writing does not appear to be a contract and the terms are not
17 called to the attention of the recipient. In such a case no
18 contract is formed with respect to the undisclosed term." Id. at
19 1049-50. Here, there is no evidence Savetsky had actual notice of
20 the sample member contract on LegalShield's website, or
21 acknowledged the existence of such a contract prior to purchasing
22 his membership. In fact, by simply checking the desired services
23 and clicking the "BUY NOW" button, a consumer can order a
24 LegalShield plan without even being aware a member contract exists.
25 Not to mention that a consumer would only receive actual notice if
26 he clicked through two optional links and read to page seven where,
27 under the inconspicuous heading "Settlement of Disputes," the
28 arbitration provision appears. See Windsor Mills, 25 Cal. App. 3d

1 at 993 (noting that "an offeree, regardless of apparent
2 manifestation of his consent, is not bound by inconspicuous
3 contractual provisions of which he was unaware, contained in a
4 document whose contractual nature is not obvious.").

5 Furthermore, the context in which LegalShield's member
6 contract appears does not put users on "inquiry notice" of the
7 contract or its terms. See Specht, 306 F.3d at 30-32. The "More
8 Plan Details" link (which users must click to find the contract or
9 even to find the warning to check the contract for further terms
10 and conditions) appears after a list of features of the plan
11 (features LegalShield calls "Plan Details") including "Legal
12 Advice/Consultation," "Legal Document Review," or "Trial Defense."
13 In this context, a reasonable person could easily conclude that
14 "More Plan Details" are simply an even fuller list of features
15 LegalShield offers to its members, not the member contract or
16 additional terms and conditions. Given the lack of actual notice
17 and the fact that "a reasonably prudent user [would not be] on
18 inquiry notice of the terms of the contract," Nguyen, 763 F.3d at
19 1177, or even the location of the contract on LegalShield's
20 website, the Court cannot conclude that "a reasonable person in
21 [Savetsky's] position would understand that he had assented to the
22 arbitration provision in the [LegalShield member contract] when he
23 purchased" his membership. Knutson, 771 F.3d at 565.

24 Nor would a reasonable person in Savetsky's position
25 understand that by not cancelling his LegalShield membership after
26 receiving a copy of the membership contract he was assenting to the
27 arbitration provision. True, "[a]cceptance of an offer may be
28 inferred from inaction in the face of a duty to act . . . and from

1 retention of the benefit offered," but here the contract did not
2 contain any such duty to act. Golden Eagle Ins. Co. v. Foremost
3 Ins. Co., 20 Cal. App. 4th 1372, 1385-86 (Cal. Ct. App. 1993)
4 (citations omitted). Instead, the membership agreement simply
5 provides that Savetsky may cancel his membership "at any time by
6 giving written notice to the Company," Pinson Decl. Ex. C. To put
7 it another way, "[a] person can assent to terms even if he or she
8 does not actually read them, but the 'offer must nonetheless make
9 clear to a reasonable consumer' both that terms are being presented
10 and that they can be adopted through the conduct that the offeror
11 alleges constituted assent." Schnabel v. Trilegiant Corp., 697
12 F.3d 110, 123 (2d Cir. 2012) (internal alterations omitted)
13 (emphasis added) (quoting Specht, 306 F.3d at 29) (applying
14 California law). Here nothing in the membership contract indicated
15 that inaction by Savetsky would constitute assent to the terms of
16 the contract. Accordingly, a reasonable consumer reading the
17 membership contract would have no way of knowing that failing to
18 cancel his membership could be construed as assent to arbitrate all
19 disputes with LegalShield.

20 This sharply distinguishes this case from Hill v. Gateway
21 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) and other cases
22 LegalShield cites enforcing shrinkwrap agreements. See Carnival
23 Cruise Lines, Inc. v. Shute, 499 U.S. 585, 587 (1991) (enforcing a
24 forum selection clause against cruise ship passengers where the
25 ticket stated that "[t]he acceptance of this ticket . . . shall be
26 deemed to be an acceptance and agreement . . . of all [its] terms
27 and conditions"); Lima v. Gateway, Inc., 886 F. Supp. 2d 1170, 1178
28 (C.D. Cal. 2012) (noting that the subsequent document "prominently

1 states in capital letters and bold font that it applies to [the
2 plaintiff's] purchase unless within 15 days . . . he notifies [the
3 defendant] in writing that he does not agree to it and returns his
4 product"); Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097, 1011
5 (C.D. Cal. 2002) ("If you do not accept these terms, please notify
6 us immediately and we will cancel your service."); O'Quin, 256 F.
7 Supp. 2d at 517 ("According to the Terms and Conditions Pamphlet,
8 it is the activation and use of Defendant's . . . services . . .
9 that constitutes the acceptance of the arbitration agreement.");
10 Sherr v. Dell, Inc., No. 05cv10097 (GBD), 2006 WL 2109436, at *2
11 (S.D.N.Y. July 27, 2006) ("The customer need only return the
12 product according to the return policy in order to reject the
13 Agreement."). Unlike these cases, the membership agreement
14 Savetsky received provided no indication whatsoever that legal
15 consequences (like assent to the arbitration provision) would flow
16 from his failure to cancel the contract.

17 Because the "outward manifestations of consent" present in
18 this case would not lead "a reasonable person to believe [Savetsky]
19 has consented to the agreement," the Court finds there was no valid
20 and enforceable agreement to arbitrate. Knutson, 771 F.3d at 565.

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1 **V. CONCLUSION**

2 Because there was no valid and enforceable agreement to
3 arbitrate, there is no basis to compel arbitration. Accordingly,
4 LegalShield's motion is DENIED.

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6 IT IS SO ORDERED.

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8 Dated: February 12, 2014


UNITED STATES DISTRICT JUDGE